U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: April 23, 1990
CASE NO. 85-ERA-0021

IN THE MATTER OF

DANIEL MILEWSKI,
COMPLAINANT,

v.

KANSAS GAS AND ELECTRIC COMPANY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DENYING MOTION FOR RECONSIDERATION AND TO DISMISS, AND TO SUBMIT SETTLEMENT AGREEMENT OR OTHER EXPLANATION FOR JOINT MOTION BELOW

By order of January 15, 1988, the parties were informed that, if they desired to resolve this matter by mutual agreement, they should submit an explanation of the basis for their joint motion for withdrawal, and, if the basis of that notion were an agreement between the parties, they should submit a copy of the settlement agreement. Sec. Order To Submit Information (Order to Submit), January 15, 1988. Respondent moved for reconsideration of this order and for dismissal of the complaint on the ground that, under Rule 41(a)(1) of the Federal Rules of Civil

Procedure, the parties to this proceeding have an unconditional right to a final order of dismissal based upon the withdrawal of the complaint by Complainant and Respondent's withdrawal of its request for hearing through the Joint Motion to Dismiss. Respondent's

Motion for Reconsideration of Secretary's Order to Submit Information and for Dismissal of Proceedings (Respondent's Motion) at 3.

Specifically, Respondent argues that, because the regulations at 29 C.F.R. Part 24 (1989), which implement the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), and under which this case arises, do not address the withdrawal of complaints, Rule 41(a)(1) of the Federal Rules of Civil Procedure applies. In Respondent's view, therefore, the ALJ properly ordered dismissal of the case based solely on the joint motion of withdrawal. Respondent further argues that, because section 24.6(a) of Part 29, which authorizes review of an ALJ's decision by the Secretary, refers only to recommended decisions issued after the termination of the proceeding at which evidence was submitted, the ALJ'S Order of Dismissal is not reviewable, there having been no evidentiary hearing on the complaint in this case. Finally, Respondent argues that, "[s]ince the Secretary is not a party to resolution of this dispute, Respondent believes that the Secretary has no statutory obligation to determine the fairness, adequacy and reasonableness for the parties filing of the Joint Motion to Dismiss." Respondent's Motion at 8.

Although Rule 41(a) is generally applicable to the voluntary withdrawal of ERA complaints, *see Nolder v. Kaiser Engineers, Inc.*, Case No. 84-ERA-5, Sec. decision, June 28, 1985, slip op. at 6-7, it is not applicable where the parties request dismissal on the basis of a settlement. *See Hoffman v. Fuel Economy Contracting and Omaha Public Power District*, Case No. 87-ERA-33, Sec. Order Denying Request to Reconsider, Aug. 4, 1989, slip op. at 2-3 (copy appended). In cases where the employer has filed a request for hearing, as this Respondent has done, Rule 41(a)(1)(ii) would be the applicable rule. *See Nolder*, slip op. at 8, holding that the filing of a request for hearing by employer is the equivalent of an answer for purposes of Rule 41.

I do not, however, agree with Respondent that the ALJ's order of Dismissal thus becomes unreviewable. I have ruled previously that "under the regulations implementing the ERA, 29 C.F.R. Part 24 (1988), except in limited circumstances, see 29 C.F.R. § 24.5(e) (4), an ALJ's decision is only a recommended decision. Final orders are issued by the Secretary. 29 C.F.R.

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§ 24.6." *Cowan v. Bechtel Construction Co.*, Case No. 87-ERA-29, Aug. 8, 1989, Sec. Decision and order of Remand, slip op. at 1, n.1. *See also Samodurov v. Niagara Mohawk Power Corporation*, Case No. 89-ERA-20, Sec. Order to Submit Settlement, Feb. 22, 1990, ruling that, inasmuch as the ALJ's dismissal of the complaint in that case "purported to finally dispose of the actions against Niagara, it . . . constituted a recommended decision under the provisions of 29 C.F.R. § 24.6(a)." Slip op. at 2, n.2. Thus the ALJ's Order of Dismissal here, although not labeled a "recommended" order, is not a final order and is subject to my review and issuance of a final order.

Furthermore, because the parties have not disclosed the basis for their request that the claim be dismissed, it is not clear whether Rule 41(a) (1) (ii) is applicable under the circumstances of this case. As stated in the Order to Submit, the procedural history of this case suggests that a settlement between the parties underlies the parties' Joint Motion to Dismiss. Order to Submit at 2. Where an ERA complaint has been settled, Rule 41(a)(1) is inapplicable.

> [B]y its terms Rule 41 does not apply where "any statute of the United States" establishes other procedures for dismissal of actions pursuant to settlements, for example class actions, bankruptcy proceedings, shareholder derivative suits, or antitrust suits. The ERA requires the Secretary to issue an order resolving the case "unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation. . . " 42 U.S.C. § 5851(b)(2)(A).1/
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> 1/ The provisions of the Rules of Practice and Procedure for Administrative Hearings before the office of Administrative Law Judges, 29 C.F.R. Part 18 (1988), upon which Respondents rely in part, do not apply where they are inconsistent with specific statutes or regulations. 29 C.F.R. § 18.1(a).

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Hoffman v. Fuel Economy etc., slip op. at 3-4. The fact that the Secretary may not be a signatory of the settlement agreement does not, as Respondent contends, relieve the Secretary of the statutory obligation to determine the fairness, adequacy or reasonableness of an ERA settlement. The Secretary fulfills the statutory obligations of protecting the public interest by reviewing the terms of the settlement agreed upon by the private parties. *Scott v. American Protective Service*, Case No. 89-ERA-35, Sec. Order to Submit Settlement, Feb. 15, 1990, at 2; *Hoffman v. Fuel Economy etc.*, slip op. at 3-4. In this connection, I have held that "it is error for the ALJ to dismiss a case without reviewing the settlement and making a recommendation of whether the settlement is fair, adequate and reasonable." *Fuchko and Yunker v. Georgia Power Company*, Case Nos. 89-ERA-9 and 10, Sec. Order to Submit Settlement Agreement, Mar. 23, 1989, slip op. at 2. The United States Court of Appeals for the Ninth Circuit in *Thompson v. Dept. of Labor*, 885 F.2d 551 (1989), has recognized that in ERA cases "[t]he Secretary must approve all settlement agreements . . . . " 885 F.2d at 556.

Accordingly, Respondent's request is DENIED. The parties are ordered to submit, within 30 days from receipt of this order, an explanation of the basis for their Joint Motion, and, if the basis of that motion is an agreement between the parties, a copy of the settlement agreement signed by both parties, including Complainant individually, and setting forth all the terms and conditions agreed to. Failure to comply with this order will result in the case being remanded to the ALJ for a hearing on the merits.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.